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In the Supreme Court of the United States

OCTOBER TERM, 1983

JAMES MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION, PETITIONER

v.

GEORGE JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent is constitutionally entitled to specific performance of a plea proposal made by the prosecution, but withdrawn before he entered a plea or otherwise acted in reliance on it.

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INTEREST OF THE UNITED STATES

This case presents an important issue regarding the enforceability of a plea proposal withdrawn by a prosecutor before the defendant has entered a plea or otherwise acted in reliance on it. The courts of appeals that have addressed the question are in conflict. Because guilty pleas and their negotiation play such a prominent role in the federal criminal justice system, the United States has a substantial interest in the outcome of this case.[1]

[1] Guilty pleas account for the vast majority of all criminal convictions in federal courts. In the calendar year ending June 30, 1983, of 35,591 criminal convictions in the United States district courts, 30,523, or 86%, were by pleas of guilty or nolo contendere. *Report of Director of Administrative Office of United States Courts for Period July 1, 1982-June 30, 1983* App. Table D-4.

STATEMENT

1. In May 1970, respondent and another man broke into the house of W.A. Siscoe with intent to burglarize it. While the burglary was in progress, the Siscoes and their daughter Vicki returned to the house. Vicki entered the house first and confronted the burglars. Responding to her screams, Mr. Siscoe entered the house. One of the intruders threatened to kill Mr. Siscoe and grabbed Vicki to shield his escape. Mr. Siscoe and one of the intruders exchanged shots. Vicki was fatally wounded, and Mr. Siscoe and respondent were wounded. Pet. App. A2; see *Johnson* v. *State*, 252 Ark. 1113, 482 S.W. 2d 600 (1972). Respondent was convicted of first degree murder and sentenced to life imprisonment. He was subsequently convicted on charges of burglary and assault with intent to kill and sentenced to concurrent 21-year and 12-year terms of imprisonment, respectively. Following sentencing on the burglary and assault charges, the Arkansas Supreme Court reversed respondent's murder conviction for failure to give a requested jury instruction and remanded for a new trial. Pet. App. A2; 252 Ark. at 1120, 482 S.W.2d at 606.

After remand, Harold Hall, a public defender, was appointed to represent respondent. On Friday, October 27, 1972, the prosecutor contacted Hall and proposed to recommend a 21-year sentence, to be served *concurrently* with respondent's burglary and assault sentences, in exchange for a guilty plea to being an accessory after a felony murder. Hall informed respondent the next day of the proposed terms, and respondent agreed to accept them. The following Monday, October 30, 1972, Hall called the prosecutor and accepted the proposed plea. However, the prosecutor explained that a mistake had been made. He withdrew the plea offer and proposed instead to recommend a 21-year sentence to be served *consecutively* to respondent's other sentences. Hall never responded to this second proposal. Pet. App. A2-A3.

Represented by another public defender, respondent proceeded to trial on November 8, 1972, but a mistrial was declared because of prejudicial newspaper publicity.

After further continuances respondent agreed to a plea bargain on essentially the same terms as the modified proposal put to Hall on October 30, 1972. Respondent entered a plea of guilty on February 26, 1973, to a charge of accessory after a felony murder and was sentenced to 21 years' imprisonment to run consecutively to the burglary and assault sentences. Pet. App. A3.

2. Respondent sought and was denied post-conviction relief in the state courts on the grounds of mistake and ineffective assistance of counsel. *Johnson* v. *State*, No. CR-78-18 (Ark. June 5, 1978) (unpublished opinion). He then filed a motion under 28 U.S.C. 2254 in the United States District Court for the Eastern District of Arkansas on essentially the same grounds. Pet. Supp. App. 4. The matter was referred to a magistrate for an evidentiary hearing, report, and recommendation. After the initial hearing, respondent raised the additional claim that he is constitutionally entitled to specific performance of the prosecutor's withdrawn plea proposal of October 27, 1972. Pet. App. A4; Pet. Supp. App. 15.

In his final recommendation, which was adopted by the district court (Pet. Supp. App. 2), the magistrate rejected all of respondent's contentions. He dismissed respondent's claim of entitlement to performance of the October 27, 1972, proposed plea, relying on *Virgin Islands* v. *Scotland*, 614 F.2d 360 (3d Cir. 1980). He declined to follow the conflicting authority of *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979). Pet. App. A5-A6; Pet. Supp. App. 16-20.[2]

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[2] The district court adopted the magistrate's conclusion that respondent had exhausted his available state remedies, since Arkansas courts will not permit successive petitions for collateral relief in non-capital cases. Pet. Supp. App. 16. The court of appeals affirmed that conclusion. Pet. App. A6 n.6. The State does not challenge that holding.

The district court also adopted a finding that the attorney who represented respondent *after* the plea proposal at issue here was withdrawn, John Achor, had breached his duty to act as a reasonally competent attorney by failing to interview certain witnesses (Pet. Supp. App. 11), but that this did not result in any prejudice to respondent (*id.* at 15). Since this finding concerned

On appeal, a divided panel of the Eighth Circuit reversed, adopting the reasoning of *Cooper*. The court acknowledged that this is "a fact situation that falls short of a plea bargain" (Pet. App. A8 (footnote omitted)) and that respondent had neither "enter[ed] a plea of guilty in court" nor "performed any specific action in reliance upon the plea bargain" (*ibid.*).[3] Nonetheless, the court concluded that a criminal defendant has " 'a constitutional right to enforcement of plea proposals [which] may arise before any technical "contract" has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals.' " *Id.* at A10 (quoting *Cooper*, 594 F.2d at 16-18 (brackets in original)). The court based this right on two constitutional principles: the substantive due process right of "fundamental fairness" set forth in *Santobello* v. *United States*, 404 U.S. 257 (1971), and the Sixth Amendment right to effective assistance of counsel.

The court limited its holding, as did the Fourth Circuit in *Cooper*, to cases in which the defendant has "promptly and unequivocally" agreed to the government's proposal. Pet. App. A13. It reaffirmed the government's right to make conditional proposals and to "withdraw or modify outstanding proposals that have not been accepted or rejected after a reasonable period of time." *Ibid.* Finally, it stated that "the government can withdraw a plea proposal or reopen plea negotiations, even after a plea proposal has been accepted by the defendant, if the government demonstrates that the plea proposal was based upon inaccurate or incomplete information." *Ibid.*

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a different attorney, it has no bearing on the plea negotiations between the State and Harold Hall, respondent's previous counsel.

[3] Although the court of appeals stated that "[respondent] did rely on the plea proposal to the extent that he considered the terms offered, agreed to accept the plea proposal and communicated his willingness to plead guilty to the prosecuting attorney" (Pet. App. A10), it apparently was not suggesting that these actions

On the basis of this analysis, the court held that respondent is entitled to be sentenced in accordance with the prosecutor's proposed recommendation.[4]

SUMMARY OF ARGUMENT

The issue is whether a plea proposal, once made but thereafter withdrawn by the prosecution during plea negotiations, is enforceable by specific performance even though the defendant has neither entered a plea nor otherwise acted to his detriment in reliance on it. We submit that it is not.

A.1. *Santobello* v. *New York*, 404 U.S. 257 (1971), safeguards the defendant's rights to a "voluntary and knowing" waiver of the constitutional protections of the criminal trial process by requiring that the government abide by its side of the bargain when the defendant pleads guilty in reliance on a plea agreement. The rights and interests at stake in *Santobello* are wholly absent here, where the defendant has not waived his rights or otherwise acted in reliance on the plea proposal.

Nonetheless, the court of appeals inferred from *Santobello*'s requirement of "fairness" a constitutional right to bind the government to performance of unconsummated plea proposals. The court's analysis, however, begs the question: unless the defendant is legally entitled to view a proposal as irrevocable, the principle of "fundamental fairness" does not preclude its revocation. The parties here had no reason to assume that the prosecutor's misstated proposal would be binding merely because the defendant had decided to accept it, since under contract principles and analogous plea bargaining practice a plea proposal becomes binding only upon performance or detrimental reliance by the defendant. Contract law principles embody the legal system's effort to

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amounted to "detrimental reliance" as that term is used in the law of contracts.

[4] Judge Gibson dissented, both on the ground that *Scotland* should be followed instead of *Cooper* (Pet. App. A17-A18), and on the ground that this case is distinguishable from *Cooper* on its facts. *Id.* at A15-A17.

establish fair rules for determining the rights of bargaining parties, and the court's rejection of the contract law analogy cannot reasonably be thought to be required by due process.

2. The court of appeals' reliance on the subjective hopes and expectations of the defendant offers no coherent and consistent principle for interpretation of due process requirements. Hopes and expectations may be raised—or dashed—by any number of developments during plea bargaining. Yet the very premise of the plea bargaining process, as reflected in Fed. R. Crim. P. 11(e), is that the defendant's rights are adequately protected by the right to withdraw his plea if the bargain does not work out.

3. Nor is the court of appeals' decision justifiable as a prophylactic rule to prevent prosecutorial abuse. The best protection against abuse resides in the natural safeguards of the adversarial plea bargaining process. Any abuse that amounts to a due process violation can be remedied on a case-by-case basis.

4. The court of appeals' invocation of the Sixth Amendment right to effective assistance of counsel is beside the point. Sixth Amendment rights are not endangered merely because the results of defense counsel's efforts may be disappointing to the defendant.

B. The court of appeals' conclusion that a criminal defendant has a constitutional right to enforcement of government plea proposals, prior to performance or reliance of any kind, is in fact inconsistent with *Santobello* and its progeny, which hold that rescission of a guilty plea is a constitutionally adequate remedy for breach of a plea agreement that has been performed by the defendant, in the absence of special factors, such as substantial reliance or prejudice, that would require specific performance. If specific performance is not available as a matter of constitutional right to protect the expectation interests of defendants who have performed their side of the bargain, it follows *a fortiori* that the expectation interests of a defendant who has

neither performed nor acted in reliance on a plea proposal are entitled to no more.

C. Sound reasons of policy also urge reversal. The court of appeals' holding introduces uncertainty and subjectivity into the question of plea bargains, thereby frustrating one of the key purposes of Rule 11(e) of the Federal Rules of Criminal Procedure and analogous state rules and threatening to burden the courts with a barrage of difficult-to-adjudicate claims relating to alleged unfulfilled plea offers. Moreover, it interferes unnecessarily with judicial sentencing discretion and prosecutorial discretion and prevents the correction of good faith errors and misstatements, to the detriment of society's interest in exacting fair punishment for violations of the laws.

ARGUMENT

It goes without saying that the government should abide by its bargains. The issue here is *when* an enforceable bargain has been struck. The court of appeals has frankly acknowledged that the situation here "falls short of a plea bargain." Pet. App. A8 (footnote omitted). The court has also conceded that no contract between respondent and the prosecutor concerning a plea bargain had been formed. *Id.* at A10; see also *id.* at A12-A13. And the court recognized that respondent "has not performed any specific action in reliance upon the plea bargain." *Id.* at A8. Nonetheless, "on the basis alone of [respondent's] expectations" (*id.* at A10 (citation omitted)), the court required the State to confer the benefits of a plea *proposal* made by mistake and promptly withdrawn.

The decision below relied heavily on *Cooper* v. *United States*, 594 F.2d 12 (4th Cir. 1979).[5] It is also con-

[5] The factual circumstances in *Cooper* differ from those here in four major respects: (1) in *Cooper* the prosecutor withdrew his plea proposal *before* defense counsel could communicate his acceptance, whereas here the acceptance was communicated first; (2) in *Cooper* the prosecutor pledged that the offer would be held open for a week (594 F.2d at 15 n.2), while no such pledge was made in

sistent with *United States* v. *Calabrese*, 645 F.2d 1379, 1389-1390 (10th Cir.), cert. denied, 451 U.S. 1018, 454 U.S. 831 (1981), in which the Tenth Circuit held that "once the government acknowledges the existence of an agreement," it must comply until it obtains a judicial determination that the defendant breached the agreement. *Id.* at 1390. See also *United States* v. *Lieber*, 473 F. Supp. 884 (E.D.N.Y. 1979); *Ex parte Yarber*, 437 So.2d 1330 (Ala. 1983); *Kisamore* v. *State*, 286 Md. 654, 409 A.2d 719 (1980); cf. *State* v. *Johnson*, 23 Wash. App. 490, 497, 596 P.2d 308, 312 (1979) (purportedly following *Cooper*, but defendant's partial performance might have entitled him to performance under *Scotland*).

On the other hand, the decision below is directly contrary to *Virgin Islands* v. *Scotland*, 614 F.2d 360 (3d Cir. 1980), and *United States* v. *Greenman*, 700 F.2d 1377 (11th Cir. 1983), cert. denied, No. 83-159 (Nov. 28, 1983), which held that, in the absence of detrimental reliance or prejudice, a defendant is not entitled to enforcement of a plea offer if he is aware of the government's intention not to comply with the proposed agreement before he pleads guilty. See also *Siegel* v. *New York*, 691 F.2d 620, 624 (2d Cir. 1982), cert. denied, No. 82-1108 (Feb. 22, 1983) (defendant may not reasonably rely on any promises made off the record); *United States* v. *Goodrich*, 493 F.2d 390, 393 (9th Cir. 1974) (emphasis added) ("when the prosecution makes a 'deal' within its authority *and the defendant relies on it in good faith*, the court will not let the defendant be prejudiced as a result of that reliance"). The decision is also contrary to *United States* v. *Ocanas*, 628 F.2d 353, 358 (5th Cir. 1980), and *United States* v. *Aguilera*, 654 F.2d 352, 353-354 (5th

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this case; (3) in *Cooper* the offer was properly made but overruled by higher authority, whereas here the offer was made by mistake; and (4) in *Cooper* the offer was reasonable on its face, while here the offer of, in effect, no enhanced sentence for a crime which previously had resulted in conviction for first degree murder was suspect on its face.

Cir. 1981), which held that "either party [prosecutor or defendant] should be entitled to modify its position" until a plea has been accepted by the court, and to numerous state decisions, which, like *Scotland*, have held that plea proposals are unenforceable in the absence of detrimental reliance or other objective prejudice to the defendant.[6]

We believe that *Scotland* and cases similar to it present the better view, and thus that the court of appeals should be reversed.

A. Withdrawal Of A Plea Bargain Before The Defendant Has Taken Action In Reliance On It Violates Neither Due Process Guarantees Nor The Right To Effective Assistance Of Counsel

1. In requiring performance of the withdrawn plea proposal in this case, the court of appeals has, we believe, followed its " 'personal and private notions' of fairness"—unjustified ones at that—rather than the more limited " 'fundamental conceptions of justice' " which underlie the Due Process Clause. See *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977) (quoting *Rochin* v. *California*, 342 U.S. 165, 170 (1952), and *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935)). The starting point in our analysis is this Court's decision in *Santobello* v. *New York*, 404 U.S. 257 (1971).

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[6] *People* v. *Barnett*, 113 Cal. App. 3d 563, 170 Cal. Rptr. 255 (1980); *Shields* v. *State*, 374 A.2d 816, 819-820 (Del.), cert. denied, 434 U.S. 893 (1977), *State* v. *Reasbeck*, 359 So. 2d 564, 565 (Fla. Dist. Ct. App. 1978); *People* v. *Young*, 52 Ill. App. 3d 671, 674, 367 N.E.2d 976, 978 (1977); *State* v. *Edwards*, 279 N.W.2d 9, 11-12 (Iowa 1979); *Cope* v. *Commonwealth*, 645 S.W.2d 703, 704 (Ky. 1983); *State* v. *Caminita*, 411 So. 2d 13, 16 (La.), cert. denied, (Iowa 1979); *Cope* v. *Commonwealth*, 645 S.W.2d 703, 704 (Ky. 459 U.S. 976 (1982); *Wynn* v. *State*, 22 Md. App. 165, 172-173, 322 A.2d 564, 568 (1974) (principle modified by *State* v. *Brockman*, 277 Md. 687, 697-700, 357 A.2d 376, 383-384 (1976)); *Commonwealth* v. *Smith*, 427 N.E.2d 739, 742 (Mass. 1981); *People* v. *Heiler*, 79 Mich. App. 714, 262 N.W.2d 890 (1977); *State* v. *Collins*, 300 N.C. 142, 148-149, 265 S.E.2d 172, 176 (1980); *State* v. *Bero*, 645 P.2d 44 (Utah 1982); *State ex rel. Gray* v. *McClure*, 242 S.E.2d 704 (W. Va. 1978); *State* v. *Beckes*, 100 Wis. 2d 1, 300 N.W.2d 871 (Ct. App. 1980).

Santobello held that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. This holding is grounded in the requirement that a "guilty plea [be] knowingly and voluntarily made." *Blackledge* v. *Allison*, 431 U.S. 63, 75-76 n.8 (1977); see *Santobello*, 404 U.S. at 261-262; *id.* at 264-266 (Douglas, J., concurring); *Brady* v. *United States*, 397 U.S. 742, 754-755, 756-757 (1970). "[A] guilty plea is a serious and sobering occasion inasmuch as it constitutes a waiver of the fundamental rights to a jury trial, to confront one's accusers, to present witnesses in one's defense, to remain silent, and to be convicted by proof beyond all reasonable doubt." *Santobello*, 404 U.S. at 264 (Douglas, J., concurring) (citation omitted). A guilty plea must therefore be made only by " 'one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel.' " *Brady*, 397 U.S. at 755 (quoting *Shelton* v. *United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), rev'd on other grounds, 356 U.S. 26 (1958)). If the plea is induced by " 'unfulfilled or unfulfillable promises' " (*ibid.*), then it cannot be considered knowing and voluntary.

These considerations are wholly absent from this case. Respondent was not induced to plead guilty [7] or to waive his constitutional rights in return for an unfulfilled or unfulfillable promise. Indeed, he did not perform any specific action whatsoever in reliance on the proposal. Pet. App. A8; see *Cooper*, 594 F.2d at 18 n.8. The State's actions in this case, therefore, fully comported with the principles of *Santobello*.

Nonetheless, the court of appeals found that the " 'fairness' requirement set forth in *Santobello*" can be read to

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[7] After the prosecutor withdrew the original proposal and corrected his misstatement, defense counsel did not respond. Respondent later stood trial, and only after a mistrial was declared did he accept the State's revised terms and plead guilty. Pet. App. A3.

require the government to honor, not just the terms of a consummated plea agreement, as in *Santobello*, but of a plea proposal as well. Pet. App. A12-A13. But the court of appeals' notion of "fairness" begs the question: we can readily agree that the defendant should have a remedy for breach of a binding promise, but the opinion provides no coherent or consistent basis for determining *when* a proposal becomes a binding and irrevocable promise. And absent a prior understanding that a proposal that the offeree has decided to accept is irrevocable, there is nothing "unfair" about revoking it. As we survey the possible points in the plea negotiations process at which the plea proposal could be deemed binding—at the oral offer, the oral acceptance, the written reduction of terms, the time of reliance, the actual plea, the acceptance by the court, the pronouncement of sentence; there may be others [8]—we do not see why "fundamental fairness" should preclude adoption of any of the alternatives (so long as a known rule is consistently followed), at least up to the point where the defendant pleads guilty or otherwise acts to his detriment in reliance on the bargain. Only at that point, we submit, could due process considerations come into play.

While recognizing that issues of constitutional rights cannot be made subordinate to the rules of commerce (cf. *Brewer* v. *Williams*, 430 U.S. 387, 401 n.8 (1977)), we submit that contract law—the function of which is, after all, fairly to define the rights of bargaining parties—is a useful, natural, and sensible source of guidance in a case like this.[9] See *United States* v. *Carrillo*, 709 F.2d 35, 36

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[8] Indeed, the court below appears to have adopted a variation, or variations: the government's oral offer is binding upon being made, but only if accepted within "a reasonable period of time," and only if more "[ ]accurate or [ ]complete information" does not become available to the government. Pet. App. A13.

[9] Since the extensive corpus of contract law must of necessity include rules that define rights even for close cases in which a different rule might still be said to be "fair," whereas due process concepts reach only actions aptly characterized as "fundamentally"

& n.1 (9th Cir. 1983); *Brooks* v. *United States*, 708 F.2d 1280, 1281 (7th Cir. 1983).[10]

And it seems agreed (see Pet. App. A10; *Cooper*, 594 F.2d at 16; *Scotland*, 614 F.2d at 364) that under traditional contract principles no binding agreement was formed here. A plea bargain is essentially a form of unilateral executory contract; the government's promise becomes binding only upon performance or detrimental reliance by the defendant. *Scotland*, 614 F.2d at 364. Even after the defendant has indicated his agreement with its terms, the plea offer cannot be considered a bilateral contract—an exchange of a promise for a promise—because the defendant is not bound by his "acceptance." He does not "promise"—in any contractual sense of the term—to plead in accordance with the agreement, since he is perfectly free up to the time he actually pleads to change his mind and to stand trial (or to negotiate for a more favorable plea bargain). The government thus receives no consideration for its "promise" to perform, and under the law of contracts is free to withdraw the offer until the defendant performs his side of the bargain.[11]

This result comports with the principle of fairness in its central sense of evenhandedness. As one court has expressed it:

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unfair, there may be many circumstances in which the Constitution does not hold the government to the law of contracts. But cases in which due process confers rights not available under contract law should be rare indeed.

[10] The court of appeals acknowledged that "[t]he analogy between contracts and plea agreements works well in the usual plea bargain case" (Pet. App. A8), but concluded that "[t]raditional contract principles * * * are of little guidance" here (*ibid.*)—for no apparent reason other than that they lead to the conclusion that there was no binding obligation on the State. But we believe that contract principles—particularly the doctrine of promissory estoppel or detrimental reliance—aptly capture the justice of the case.

[11] The doctrine of mistake might also have application in the circumstances of this case, where the prosecutor's initial offer seems to have resulted from an inadvertent misstatement.

> Obviously the State could not specifically enforce an agreement by requiring a defendant to plead guilty if before doing so he had a change of heart. Our sense of justice is not affronted by denying that privilege to the defendant as well.

Wynn v. *State*, 22 Md. App. 165, 173, 322 A.2d 564, 568 (1974).

Under the contractual doctrine of detrimental reliance or promissory estoppel, detrimental reliance on a promise is treated as if it were consideration; the effect is to estop the offeror from revoking his proposal. This solves the problems that otherwise would occur if the offeror were permitted to revoke his offer after the offeree had partially performed or substantially changed his position to his detriment in reliance on the offer. In the plea bargaining context, the doctrine of detrimental reliance would fully vindicate the rights of the accused and cure any unfairness resulting from the government's ability to revoke its nonbinding unilateral offer. See *Goodrich*, 493 F.2d at 393.[12]

An example of detrimental reliance might be a defendant's cooperation with law enforcement officials by testifying or providing valuable information, or by mak-

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[12] The precise limits of this position need not be fleshed out in this case. The *Scotland* court would make a plea proposal enforceable only where the defendant "has relied on the bargain in such a way that a fair trial would no longer be possible." 614 F.2d at 365. As noted in text, we believe there are circumstances where a defendant might become entitled to enforcement of a proposal because of detrimental reliance, such as cooperating with law enforcement officials, even though the reliance would not detract from the fairness of trial. See *State* v. *Brockman*, 277 Md. 687, 697-700, 357 A.2d 376, 383-384 (1976). Other courts take the position that, in the absence of other reliance or prejudice, a plea agreement becomes binding on the parties only when it is accepted by the court. *E.g.*, *Aguilera*, 654 F.2d at 353-354; *Ocanas*, 628 F.2d at 358; *Heiler*, 79 Mich. App. at 720, 262 N.W.2d at 894. This case does not present these issues, however, for respondent did not take any specific action whatsoever in reliance on the misstated proposal, and the proposed plea was never tendered to the court.

ing restitution to victims. If the government has bargained for such actions, in return for which it would receive a guilty plea and recommend a light sentence or dismissal of other charges, and if the defendant has cooperated in reliance on the bargain, the circumstances may be such that the government should not thereafter be permitted to renege on the concessions it has offered to induce the defendant's actions. See *United States* v. *Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983); *State* v. *Brockman*, 277 Md. 687, 357 A.2d 376 (1976); *State* v. *Kuchenreuther*, 218 N.W.2d 621 (Iowa 1974).[13]

In some instances, the reliance may be less active. For example, a defendant might be induced by a plea proposal to neglect preparation for his defense; in such a case, the mere passage of time without trial preparation might constitute detrimental reliance.[14] Moreover, a due process claim might be made out upon a showing that the government's conduct in the plea bargaining negotiations was motivated by bad faith or an attempt to gain undue advantage over the defendant. Cf. *United States* v. *Goodwin*, 457 U.S. 368 (1982); *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978).

Under these standards, the instant case is easy to resolve. Here it is admitted that respondent took no specific action in reliance on the government's offer. The prosecutor's offer was communicated to him on Saturday; on Monday it was withdrawn and corrected. None of respondent's rights or interests was prejudiced in any way by the incident, and there is no suggestion of prosecutorial bad faith or abuse. From the sequence of events, it would appear that a deputy prosecutor innocently mis-

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[13] This assumes, of course, that the defendant is willing to complete performance of his side of the bargain.

[14] But see *People* v. *Ciatti*, 17 Mich. App. 4, 7-8, 168 N.W.2d 902, 903 (1969) (because plea could be rejected by court, "defendant's attorney could not properly rely on any agreement with the prosecutor as a reason for being unprepared").

spoke when he offered "concurrent" rather than "consecutive" terms. While we can understand respondent's regret that he could not take advantage of the prosecutor's momentary confusion—which would effectively have left him with no punishment for a serious crime—we cannot agree that he suffered any detriment that would entitle him, as a matter of due process, to do so.

2. Acknowledging the lack of any specific reliance in this case, the court of appeals held that the plea proposal became enforceable "on the basis alone of [respondent's] expectations" (Pet. App. A10). This is a significant deviation from the contractual doctrine of detrimental reliance, since the latter refers only to specific objective changes in position resulting from the offer. So it is with plea proposals. "Analogous to promissory estoppel, plea bargaining must have more substantiality than mere expectation and hope. It must have explicit expression and reliance and is measured by objective, not subjective, standards." *Johnson* v. *Beto*, 466 F.2d 478, 480 (5th Cir. 1972); see *Greenman*, 700 F.2d at 1379 n.1; *Aguilera*, 654 F.2d at 354; *Ocanas*, 628 F.2d at 358; *United States* v. *Futeral*, 539 F.2d 329, 331 (4th Cir. 1975).

The court of appeals' reliance on respondent's "personal expectations" (Pet. App. A10) has a curious self-fulfilling quality about it. So far as the record shows, respondent was not particularly surprised at the prosecutor's withdrawal of the misstated proposal. If he felt aggrieved or deprived of the benefits of a rightful bargain, he made no serious attempt to do anything about it. The most likely explanation is that he and his counsel were aware of the prosecutor's inadvertent confusion of the terms "concurrent" and "consecutive," and anticipated that the proposal might be corrected. So far as the record shows, respondent did not bring the incident to the attention of the deputy prosecutor's superiors. He did not attempt to obtain performance of the proposal from the trial court, or during subsequent plea sessions. Nor did he raise the issue on appeal, in the course of state collateral review, or

in his original habeas petition in federal district court.[15] Only when *Cooper* was decided by the Fourth Circuit—nine months after the Arkansas Supreme Court affirmed the denial of collateral relief—did respondent think to assert that his expectations had been unconstitutionally defeated. From the sequence of events, it appears that it was the decision in *Cooper*—not the tendered plea proposal—that aroused respondent's expectations. If the court of appeals is affirmed, however, we may confidently predict that prisoners and defendants all across the land will come to have "reasonable expectations" that an oral plea proposal, once made, will be deemed binding on the government.

The *Cooper* court warned against the "beguiling precision" (594 F.2d at 18) of contract law, but its concept of "expectation interests" (*id.* at 20) is simply too vague and elastic to serve as a substitute. A defendant's hopes and expectations may be aroused—or dashed—by all manner of statements and actions during the plea bargaining process. A defendant may become hopeful at the advent of plea negotiations, only to be disappointed when the prosecutor ultimately decides not to close a deal. This does not give rise to a constitutional right to a bargained plea. See *Weatherford* v. *Bursey*, 429 U.S. 545, 561 (1977). A prosecutor may well make a promise that does not amount to a plea bargain; but the fact that the defendant's "personal expectations" may be deflated if the promise is broken does not render that promise enforceable. See *Roe* v. *United States Attorney*, 618 F.2d 980 (2d Cir.), cert. denied, 449 U.S. 856 (1980).[16] Most

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[15] Although the issue has not been preserved or presented to this Court by petitioner, we note that respondent's claim arguably was thrice defaulted: when he pled guilty without protest; when he failed to appeal; and when he failed to include the claim in his state collateral attack proceeding.

[16] In *Roe*, the prosecutor made a promise to a prisoner concerning place of confinement *after* the prisoner had supplied valuable information. Despite the "false expectations" (618 F.2d at 982)

commonly of all, the prosecutor may agree to recommend a particular sentence, and the defendant may thereby be induced to plead guilty. But if the judge declines to accept the plea agreement, the remedy, if any, is merely to permit the defendant to withdraw his plea. See *United States* v. *Yates*, 698 F.2d 828, 829-830 (6th Cir. 1983), cert. denied, No. 82-6317 (Apr. 4, 1983); *United States* v. *Mercer*, 691 F.2d 343, 345 (7th Cir. 1982); *United States* v. *Adams*, 634 F.2d 830 (5th Cir. 1981); Fed. R. Crim. P. 11(e)(2), (4).[17] There is no protection for the defendant's "expectation interests" any more than for the precisely parallel expectation interests of any other offeree of a unilateral contract prior to performance or detrimental reliance.

Since the expectations of the defendant are not a sufficient basis for making plea proposals enforceable in other contexts, we submit that the court of appeals was in error when it found that respondent's expectations "alone" could provide a basis for making the prosecutor's misstated proposal here binding and enforceable. To the contrary, it is well settled that liberty or property interests protected by the Due Process Clause do not derive from a person's "unilateral hope" (*Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981)); to be protected, expectations must be grounded in statute, regulation, or some other source of law (*ibid.*), such as contract law.

3. Nor does the need to "discourage the potential abuse of the plea bargaining process" (Pet. App. A14) justify

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raised by the promise, the court concluded that performance of it was not constitutionally required. The promise was "gratuitous, and there was no detrimental reliance" (*ibid.*).

[17] Under federal practice, a defendant must be permitted to withdraw a plea if the trial court declines to agree to dismissal of charges (Fed. R. Crim. P. 11(e)(1)(A)) or to a specific disposition of the case (Rule 11(e)(1)(C)). A defendant is not entitled to withdraw if the plea is based on the prosecutor's promise to recommend a disposition or to remain silent (Rule 11(e)(1)(B)), even if the court does not accept the recommendation. See Fed. R. Crim. P. 11(e)(2) advisory committee note 1979 amend. (citing *United States* v. *Savage*, 561 F.2d 554 (4th Cir. 1977)).

imposition of a prophylactic rule preventing the government, once it has made a plea proposal, from revoking or modifying it before the defendant has had a reasonable time to accept. See *United States* v. *Goodwin*, 457 U.S. 368, 384 (1982). The court of appeals perceived a possibility that the government could "take advantage of [the defendant's] acceptance of the plea proposal," perhaps by "exploit[ing] [his] decision to plead guilty by further hard bargaining and by recommending a longer sentence." *Ibid.* Assuming such conduct would violate due process rights,[18] the drastic remedy ordered by the court of appeals, which does not depend on any finding of improper conduct, is not required.

The best protection against abuse is the adversarial process of plea bargaining itself. "Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978) (quoting *Brady* v. *United States*, 397 U.S. at 752). In the " 'give-and-take negotiation common in plea bargaining,' " this Court has observed, " 'the prosecution and defense * * * arguably possess relatively equal bargaining power.' " 434 U.S. at 362 (quoting *Parker* v. *North Carolina*, 397 U.S. 790, 809 (1970) (opinion of Brennan, J.)). A defendant assisted by competent counsel is not without recourse in the face of what he considers a manipulative use of the plea bargaining system. It is a "simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his constitutional right to stand trial." *Goodwin*, 457 U.S. at 378. A defendant may always elect to exercise the right which the prosecutor wishes him to abandon—he can go to trial.[19]

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[18] The validity of such an assumption is by no means obvious, where the bargaining is conducted by attorneys on an arm's length basis, and where the defendant's attorney is wholly free to engage in the same tactics.

[19] Moreover, a prosecutor who reneges on prior representations injures his reputation and his professional effectiveness. *State* v.

Perhaps there could be cases in which manipulative offers and withdrawals of plea proposals would so prejudice the defendant's rights as to violate due process.[20] In such instances, the courts are able to fashion appropriate remedies, perhaps including specific performance of a withdrawn proposal. The court of appeals' prophylactic approach is simply excessive.[21]

4. Nor does the Sixth Amendment right to effective assistance of counsel justify the judgment below. Relying on *Cooper*, 594 F.2d at 18-19, the court of appeals held:

> "Because prosecutors are required to conduct plea negotiations through defense counsel, the government's positions and communications in plea discussions are necessarily mediated through his [or her] counsel . . . . To the extent that the government attempts through defendant's counsel to change or retract positions earlier communicated, a defendant's confidence in his [or her] counsel's capability and professional responsibility, as well as the government's reliability, are necessarily jeopardized and the effectiveness of counsel's assistance easily compromised."

Pet. App. A10 (brackets and deletion in original). But the fact that defense counsel is the medium for communi-

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Edwards, 279 N.W.2d 9, 12 (Iowa 1979); see ABA Standards Relating to the Prosecutorial Function §§ 4.1-4.3 (approved draft 1971).

[20] The inherent safeguards of the plea bargaining situation are such, however, that while the reported "broken plea" cases show instances of mistake, misunderstanding, or poor organization, few if any reveal unfair prosecutorial manipulation.

[21] The court of appeals' remedy for potential prosecutorial abuse is even more extreme than that rejected by this Court in analogous circumstances in *Goodwin*. There, the court of appeals merely established a rebuttable presumption of abuse. Here, the court of appeals would not permit withdrawal of a plea proposal even if the government could prove the terms of the offer reflected an innocent mistake.

cation of positions and information—much of it, in the ordinary course of affairs, disappointing to the defendant—cannot support a constitutional claim of ineffective assistance of counsel. Under such a view, hardly a criminal trial could proceed without giving rise to an ineffectiveness claim. It may well be that the defendant's confidence in his counsel will be "jeopardized" by the communication of adverse results; the human tendency to blame the messenger is surely as strong in criminal defendants as in anyone. However, a claim of ineffective assistance of counsel requires evidence that the attorney's actual performance fell below the standard of practice in the community. A defendant's shaken confidence is not enough. *Scotland*, 614 F.2d at 363; see *Morris* v. *Slappy*, No. 81-1095 (Apr. 20, 1983).[22]

B. Finding A Constitutional Obligation To Perform A Plea Proposal In These Circumstances Would Be Inconsistent With Principles Governing The Remedies For *Santobello* Violations

When the government withdraws a plea proposal before the defendant has entered a plea or otherwise acted in reliance on it, the defendant is left in the same position he was in before the proposal was made. His rights to stand trial, confront his accusers, receive the assistance of counsel, and testify or remain silent are unimpaired.[23] He is in precisely the same position as a de-

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[22] That a defendant's loss of confidence in defense counsel could prejudice his Sixth Amendment rights is particularly farfetched here, where respondent's case was reassigned to a different public defender (as a means of redistributing the office's workload) the very day the State's plea proposal was withdrawn and modified. Aug. 22, 1979 Tr. 62-64. The court of appeals did not explain how respondent's loss of confidence in Hall—if any—could have impaired the effectiveness of successor counsel.

[23] If his rights are substantially impaired, he has suffered prejudice as a result of the proposal and its subsequent withdrawal; under our submission, therefore, he would generally be entitled to a remedy. See pages 13-14, *supra*.

fendant who, his consummated plea agreement having subsequently been breached by the prosecution, has been permitted to rescind his guilty plea and either replead or stand trial.

For example, a defendant may plead guilty to a particular charge in exchange for the prosecutor's agreement to dismiss other outstanding charges against him. If the court does not agree to the bargain, the defendant is permitted to withdraw his guilty plea and either replead or stand trial. Similarly, if the proposal were withdrawn by the prosecutor before the defendant had entered a plea (or otherwise changed his position in reliance on the plea proposal), rescission would restore the defendant to the status quo ante. He, like the defendant in the first example, would be free either to plead or to stand trial.

The constitutional law of remedies for government violations of consummated plea agreements (see *Santobello*, 404 U.S. at 263) is therefore relevant to the question of the constitutional obligations of the government to stand by offers made during the plea negotiations phase. To guarantee to the defendant who, like respondent, has neither pled nor otherwise acted in reliance on the plea agreement the benefit of his bargain would be incongruous, if the defendant who has actually entered a plea is entitled, as a matter of constitutional right, only to the remedy of rescission and not to the benefit of *his* bargain.

Yet, specific performance of plea agreements breached by the government is not, at least in the absence of detrimental reliance, prejudice, or other objective special factors, constitutionally mandated. **Mere rescission of the plea, with the right to replead or stand trial, is a constitutionally adequate remedy for the breach. The choice between rescission and specific performance is left to the discretion of the trial court, to be exercised in light of the specific circumstances of the case.** *Santobello*, **404 U.S. at 263.**

Subsequent court of appeals decisions have recognized that the choice of remedies for *Santobello* violations is a matter of discretion, not of constitutional right. *United States* v. *Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983); *United States* v. *Garcia*, 698 F.2d 31, 37 (1st Cir. 1983); *United States* v. *Wilson*, 669 F.2d 922, 923 (4th Cir. 1982); *United States* v. *Cook*, 668 F.2d 317, 321 (7th Cir. 1982); *United States* v. *Williams*, 656 F.2d 357, 359 (8th Cir. 1981); *United States* v. *American Bag & Paper Corp.*, 609 F.2d 1066, 1068 (3d Cir. 1979); *Lepera* v. *United States*, 587 F.2d 433, 436 n.4 (9th Cir. 1978); *United States* v. *Bowler*, 585 F.2d 851, 856 (7th Cir. 1978). This point is made even more clearly in the the context of federal habeas review of state convictions, where, as one court stated:

> [T]he majority opinion in *Santobello* left to the state court's discretion the decision whether to remedy a prosecutor's broken promise by requiring specific performance of that promise or by rescinding the entire plea bargain. The conclusion: a state prosecutor's breach of a plea bargain is a violation of the Federal Constitution cognizable under 28 U.S.C. § 2254, but federal courts lack the supervisory authority to specify the remedy for such a violation.

McPherson v. *Barksdale*, 640 F.2d 780, 781 (6th Cir. 1980) (footnotes omitted). Accord, *Pierre* v. *Thompson*, 666 F.2d 424, 427 (9th Cir. 1982); *Patrick* v. *Camden County Prosecutor*, 630 F.2d 206 (3d Cir. 1980); *Palermo* v. *Warden, Green Haven State Prison*, 545 F.2d 286, 297 (2d Cir. 1976), cert. dismissed, 431 U.S. 911 (1977); *Mosher* v. *LaVallee*, 491 F.2d 1346, 1348 (2d Cir.), cert. denied, 416 U.S. 906 (1974) (dictum); *Johnson* v. *Beto*, 466 F.2d 478, 479-480 (5th Cir. 1972); cf. *United States ex rel. Culbreath* v. *Rundle*, 466 F.2d 730, 735 (3d Cir. 1972) (effectively leaving choice of remedy to state authorities).[24]

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[24] But see *United States ex rel. Baker* v. *Finkbeiner*, 551 F.2d 180, 183-184 (7th Cir. 1977); *United States ex rel. Ferris* v.

To be sure, in their exercise of discretion the courts have often found one or the other remedy to be required in particular circumstances. But there have been far too many cases where a rescission remedy has been ordered [25] to place much credence in the generalization that there is a "tendency of state and lower federal courts to order that broken plea agreements be remedied by specific performance rather than by rescission." Westen & Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 Calif. L. Rev. 471, 528 (1978) (relied on by the court below (Pet. App. A10) and the *Cooper* court, 594 F.2d at 16 n.4, 18 n.8). In any event, we cannot agree with the inference (Westen & Westin, *supra*, 66 Calif. L. Rev. at 513 (cited at Pet. App. A10)) that this perceived tendency toward specific performance is an indication of an emerging "constitu-

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Finkbeiner, 551 F.2d 185 (7th Cir. 1977), cert. denied, 435 U.S. 932 (1978). These decisions are, however, questionable on several grounds. See *Lane* v. *Williams*, 455 U.S. 624 (1982).

[25] See, *e.g.*, *United States* v. *Cook*, 668 F.2d 317, 321 (7th Cir. 1982); *United States* v. *Crusco*, 536 F.2d 21, 26-27 (3d Cir. 1976); *United States* v. *Hammerman*, 528 F.2d 326 (4th Cir. 1975); *United States ex rel. Selikoff* v. *Commissioner of Correction*, 524 F.2d 650 (2d Cir. 1975), cert. denied, 425 U.S. 951 (1976); *Harris* v. *Superintendent, Va. State Penitentiary*, 518 F.2d 1173 (4th Cir. 1975); *United States* v. *Ewing*, 480 F.2d 1141, 1143 (5th Cir. 1973); *Allen* v. *Hadden*, 536 F. Supp. 586, 597 (D. Colo. 1982); *United States* v. *Baylin*, 535 F. Supp. 1145, 1150, 1152 (D. Del.), vacated on other grounds, 696 F.2d 1030 (3d Cir. 1982); *Nash* v. *Israel*, 533 F. Supp. 1378 (E.D. Wis. 1982), aff'd, 707 F.2d 298 (7th Cir. 1983); *Grant* v. *Wisconsin*, 450 F. Supp. 575, 579 (E.D. Wis. 1978); *State* v. *Chavez*, 130 Ariz. 438, 439, 636 P.2d 1220, 1221 (1981); *State* v. *Weig*, 285 N.W.2d 19, 21 (Iowa 1979); *Snowden* v. *State*, 33 Md. App. 659, 665-666, 365 A.2d 321, 325 (1976); *Johnson* v. *Commonwealth*, 214 Va. 515, 201 S.E.2d 594 (1974). The California Supreme Court has stated that a defendant is not entitled to specific performance of a plea bargain "'absent very special circumstances,'" *People* v. *Calloway*, 29 Cal. 3d 666, 672, 175 Cal. Rptr. 596, 599, 631 P.2d 30, 33 (1981) (citation omitted), principally because specific performance impairs the trial court's sentencing discretion.

tional protection [for] the personal expectations created in defendants by plea agreements with the state." [26]

The tendency, if any, of the state and lower federal courts to order specific performance in *Santobello*-type cases is readily understood without resort to a theory of constitutionally-protected expectation interests. This Court has recognized that specific performance is often the least disruptive remedy; in *Santobello*, the Court posed the question as "whether the circumstances of this case require *only* that there be specific performance of the agreement" (404 U.S. at 263 (emphasis added)). See also *United States* v. *Brown*, 500 F.2d 375, 378 (4th Cir. 1974) (describing specific performance as "the lesser relief"). Specific performance is often a more convenient remedy because it does not entail holding a trial. See *Garcia*, 698 F.2d at 37. Specific performance may be considered more appropriate once a significant portion of the sentence has been served. See *Palermo* v. *Warden, Green Haven State Prison*, 545 F.2d at 296-297; *Correale* v. *United States*, 479 F.2d 944, 950 (1st Cir. 1973). It is usually agreeable to both parties where the breach was minor or inadvertent. See *United States* v. *Green*, 543 F. Supp. 556, 558 (D. Nev. 1982). It is often preferred by the prosecution because the passage of time makes the prospect of successful retrial less likely. See *People* v. *Esposito*, 32 N.Y.2d 921, 300 N.E.2d 438, 347 N.Y.S.2d 70 (1973). And specific performance is generally more appropriate where the defendant has already given consideration other than the mere plea, such as testimony or cooperation with law enforcement officials. See *United States* v. *Carrillo*, 709 F.2d at 37 (cooperation with law enforcement officials); *United States* v. *Serubo*, 502 F. Supp. 290, 293-294 (E.D. Pa. 1980) (waiver of right to raise certain issues on appeal). In these cases, the government has already received what

[26] Interestingly, the Westen & Westin article presumes, contrary to the court below, that the government may rescind a plea proposal until the time a binding contract is formed. Westen & Westin, *supra*, 66 Calif. L. Rev. at 525 n.180 (citing *Shields* v. *State*, 374 A.2d 816, 818-819 (Del.), cert. denied, 434 U.S. 898 (1977)).

it bargained for, and it would not be possible to "wipe the slate clean" by merely vacating the plea.[27] With few exceptions (see note 24, *supra*), there is no suggestion in the opinions that the reason specific performance is granted is that the defendants' "expectation interests" are constitutionally protected.

Moreover—and more fundamentally—even when prescribing specific performance as a remedy for *Santobello* violations, the courts have nearly universally recognized that the selection of remedies is *discretionary*. The discretionary nature of the decision belies the existence of any constitutional right in a defendant to protection for his "personal expectations." In the absence of detrimental reliance or other objective prejudice to the defendant, his constitutional rights are fully vindicated if his guilty plea is vacated and he is free to replead or stand trial.[28]

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[27] We have noted our agreement (pages 9, 13-14, *supra*) with the Third Circuit's view in *Scotland*, 614 F.2d at 365, that a right to enforce a plea proposal may arise when a defendant has relied on the proposal to his detriment or is otherwise objectively prejudiced by its withdrawal. This principle, too, is supported by analogy to the *Santobello* remedy cases. Just as detrimental reliance or significant prejudice to the defendant in the case of a *Santobello* violation generally makes specific performance the preferred remedy, so also would justifiable detrimental reliance or other prejudice give a defendant a strong claim for enforcement of a withdrawn plea proposal. See *Scotland*, 614 F.2d at 365; *Serubo*, 502 F. Supp. at 293-294; *Tully* v. *Scheu*, 487 F. Supp. 404 (D.N.J.), rev'd on other grounds, 637 F.2d 917 (3d Cir. 1980), cert. denied, 454 U.S. 854 (1981); *State* v. *Brockman*, 277 Md. 687, 357 A.2d 376 (1976); cf. *Rowe* v. *Griffin*, 676 F.2d 524 (11th Cir. 1982). On the other hand, where the defendant in a *Santobello* situation has made a bare plea and can be restored to the status quo ante by the remedy of rescission, there is no compelling claim for specific performance. Similarly, where the defendant has taken no action in reliance on a plea proposal and is not objectively prejudiced by its offer and withdrawal, he has no due process right to compel enforcement of the withdrawn proposal. See *Aguilera*, 654 F.2d at 354.

[28] Even if a defendant's expectation interest in a consummated plea agreement were constitutionally protected by guarantee of a specific performance remedy, it would not necessarily follow that

C. The Decision Below Introduces Uncertainty Into The Plea Bargaining Process And Interferes With Judicial And Prosecutorial Discretion, To The Detriment Of The Public Interest In Just Punishments

The court of appeals' requirement of specific performance of government plea proposals should be overturned because, as we have demonstrated, it is not needed to remedy any violations of due process or Sixth Amendment rights. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971). The federal courts exercise no general supervisory authority over state criminal proceedings, and thus have no authority—in the absence of proven constitutional violations—to impose this sort of requirement, however strong the considerations of policy might be. *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590 (1875); see also *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977). We would submit, however, that even on grounds of policy the decision below was mistaken.

First, the decision introduces grave uncertainty into the plea bargaining process, thereby frustrating one of the key purposes of Fed. R. Crim. P. 11(e) and analogous state rules such as Ark. R. Crim. P. 24-26, *reprinted in* Ark. Stat. Ann. § 43 App. (1977).[29] Rule 11(e) requires that the terms of a plea be disclosed in open court on the record, and that the full inquiry into its accuracy and voluntariness also be recorded verbatim. See Fed. R. Crim. P. 11(e)(2), (5) and (6)(g); cf. Ark. R. Crim. P. 24.5, 24.7, 25.3(d). As this Court discussed in *Blackledge* v. *Allison*, 431 U.S. 63, 79-80 (1977), these "commendable procedures" create a record clearly showing whether a bargain exists and what its terms are. This

a defendant's expectation interest in a mere plea proposal would be deserving of the same constitutional protection. In the *Santobello* situation, the defendant has performed and the government has already received the benefits of its bargain; here, the defendant has not performed and the government has no right to compel performance. The equities of the defendant in the *Santobello* situation are far more compelling.

[29] Having been adopted in 1976, the Arkansas rules governing guilty pleas did not apply to the events at issue here.

permits "quick disposition of baseless collateral attacks" (*id.* at 80 n.19) and "insure[s] that [the plea agreement is] not ignored" (*id.* at 80). The facts of *Allison* strikingly illustrate the importance of the Rule 11 procedures: because no record was made of the terms under which Allison pleaded guilty, his subsequent assertions that a plea agreement had been made but later violated required an evidentiary hearing on his petition for habeas corpus, thus "eliminat[ing] the chief virtues of the plea system—speed, economy, and finality." *Id.* at 71; see *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979).

The decision below would return us to the days of *Allison*. If defendants are entitled to enforcement not just of plea agreements solemnly agreed to and recorded in court, but also of proposals orally made and later repudiated by the government, then the courts will again be faced with the onerous task of deciding—after the fact and without documentary evidence—whether a bargain was struck and, if so, what its terms were. See, *e.g.*, *Plaster* v. *United States*, 720 F.2d 340 (4th Cir. 1983); *Stone* v. *Cardwell*, 575 F.2d 724 (9th Cir. 1978). The "commendable procedures" of Fed. R. Crim. P. 11(e) and Ark. R. Crim. P. 24-26 would be rendered irrelevant. In the absence of detrimental reliance or other substantial prejudice to the defendant, we believe that it would be a mistake to sacrifice the relative certainty of Rule 11-type procedures to return to the informal, ambiguous, unrecorded plea agreements of the past.[30]

Second, the decision below interferes with judicial and prosecutorial discretion, to the detriment of society's interest in just punishment of those who violate its laws. See *Wade* v. *Hunter*, 336 U.S. 684, 688 (1949). The ultimate authority to determine the sentence to be imposed on convicted criminals is vested in the court—in this instance, the state court. A plea agreement, properly entered into, does not interfere with the court's discre-

[30] Largely for these reasons, the New York courts have adopted a rule, upheld against constitutional challenge in *Siegel* v. *New York*, 691 F.2d 620 (2d Cir. 1982), cert. denied, No. 82-1108 (Feb. 22, 1983), limiting enforcement of plea agreements to those whose terms are placed on the record.

tion: the court is free to accept or reject a sentence recommendation or the entire agreement. See *Santobello*, 404 U.S. at 262; *Lynch* v. *Overholser*, 369 U.S. 705, 719 (1962); Fed. R. Crim. P. 11(e)(1)(B), (4).

But to grant specific performance of a plea proposal simply because the prosecutor sought to withdraw it would enable "a defendant and prosecutor * * * to bind a trial court," so that it would not be able "to weigh the presentence report and exercise its customary sentencing discretion." *People* v. *Kaanehe*, 19 Cal. 3d 1, 14, 136 Cal. Rptr. 409, 418, 559 P.2d 1028, 1037 (1977) (footnote omitted). It would effectively displace the trial court's discretion to accept or reject the plea. See *Hammerman*, 528 F.2d at 332; *Baylin*, 535 F. Supp. at 1152. The problem is most acute in the case of agreements involving specification of a particular sentence (see Fed. R. Crim. P. 11(e)(1)(C)). In such cases, specific performance of a plea proposal offered by the prosecutor would usurp the court's entire role.[21] Even where the plea proposal involves merely a recommended sentence (see Fed. R. Crim. P. 11(e)(1)(B)), however, the sentencing court's discretion is jeopardized, as this very case illustrates. The Arkansas court, in its discretion, sentenced respondent to 21 years in prison, to be served consecutively to his prior sentences. As a result of the plea proposal, however, the court of appeals ordered respondent resentenced to 21 years, to run *concurrently*. Respondent was thus given more than specific performance, and the sentencing court's discretion was abrogated in the bargain.[22]

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[21] This is particularly significant where, as here, the prosecutor's proposed plea was a mistake. Had the prosecutor gone ahead with the original proposal of a 21-year concurrent term, the court might well have found the proposal inadequate, and compensated for the prosecutor's error by rejecting the plea or imposing a stiffer sentence. Notwithstanding defendant's "personal expectations," such a disposition would be proper. The court of appeals' judgment, however, eliminates the trial court's discretion as a corrective for prosecutorial mistakes.

[22] It would have been preferable for the court of appeals to require the state court to resentence petitioner with the benefit

The decision below interferes with prosecutorial discretion as well. During the pre-trial stage, a prosecutor "may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance." *Goodwin*, 457 U.S. at 381. Thus, "[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the social interest in prosecution. An initial decision should not freeze future conduct." *Id.* at 382 (footnote omitted). The court of appeals' decision fails to take this necessary fluidity into account. While recognizing that "the government can withdraw a plea proposal or reopen plea negotiations, even after the plea proposal has been accepted by the defendant" if the proposal was "based on inaccurate or incomplete information" (Pet. App. A13), the decision below would remove the discretion to make that judgment from the prosecutor and vest it in the court. See *ibid.* (the government must "demonstrate[]" that the proposal was based on inadequate information.)[33]

Moreover, as this very case illustrates, the court would adopt an unrealistically restrictive view of the instances in which the government should be permitted to modify its proposals. Here, the court would not permit the government to correct an innocent misstatement—a confusion of "concurrent" with "consecutive"—even though the mistake was discovered and corrected the next business

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of the state's recommendation of a concurrent 21-year term. Presumably, the court of appeals considered such a disposition inadequate to protect respondent's "expectation interests."

[33] We find it puzzling that the court would conclude that mistakes based on inadequate information may be corrected by the government, but that mistakes based on misstatements, as here, or based on inadequate understanding of prosecutorial policy, as in *Cooper*, are not. If the court were serious about the defendant's constitutionally-protected "expectation interests," it should not tolerate this exception for inadequate information. If, however, a defendant's "expectation interests" are overridden in some cases by the government's need to determine the severity of charges on an informed basis, why not here?

day. To make every plea proposal binding in this fashion is, as *Goodwin* observed, "to presume that every prosecutor is infallible—an assumption that would ignore the practical restraints imposed by often limited prosecutorial resources." 457 U.S. at 382 n.14. We see no virtue in a rule that enables criminal defendants, as a matter of constitutional law, to capitalize on the misstatements of government lawyers. Cf. *Federal Crop Insurance Corp* v. *Merrill*, 332 U.S. 380 (1947). Until a defendant has relied to his detriment on a plea proposal, the prosecutor's discretion to correct mistakes, to respond to changing circumstances, or even to change his mind, should not be impaired. *Goodwin*, 457 U.S. at 381-382.

The ultimate consequence of interference with judicial and prosecutorial discretion is borne by the public. Both court and prosecutor are vested with discretion for a reason: to exercise their best judgment to ensure that justice is done. Artificial rules making oral proposals binding and subsequently enforceable against the best judgment of court and prosecutor do not enhance due process, but only impede the just enforcement of society's laws.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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